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No. 07-335

10-23-07

In The

Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, AND GEORGE LYON,

Cross-Petitioners,

v.

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. This Cross-Petition Is Plainly Timely	2
II. The Decision Below Deprives Cross-Petitioners of Their Right to Access the Courts, a Right Not Dependent Upon Whether It Is Enjoyed by Others in Different Circumstances	5
III. The Decision Below Clearly Conflicts with Decisions of This Court and Various Federal Appellate Courts	9
IV. The City's Permission Is Not Required to Petition the Court for Certiorari	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Animal Legal Def. Fund v. *Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (en banc) 5

Babbitt v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) 9, 10

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 3

Grid Radio v. *FCC*, 278 F.3d 1314 (D.C. Cir. 2002) 7

Houghton v. *Shafer*, 392 U.S. 639 (1968) (per curiam) 7

Medimmune, Inc. v. *Genentech*, 127 S. Ct. 764 (2007) 9

NRA of Am. v. *Magaw*, 132 F.3d 272 (6th Cir. 1997) 11

O'Donoghue v. *United States*, 289 U.S. 516 (1933) 6

Parker v. *District of Columbia*, 2007 U.S. App. LEXIS 12467 (D.C. Cir. May 24, 2007) 4

Parker v. *District of Columbia*, 2007 U.S. App. LEXIS 22872 (D.C. Cir. Sept. 25, 2007) (per curiam) 1, 8

Parents Involved in Cmty. Sch. v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) 12

Peoples Rights Org., Inc. v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) 10, 11

TABLE OF AUTHORITIES

Page

Seegars v. *Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005) 1, 9, 11

Seegars v. *Gonzales*, 413 F.3d 1 (D.C. Cir. 2005) 10

Virginia v. *Am. Booksellers Ass'n*, 484 U.S. 383 (1988) 3, 10

STATUTE AND COURT RULES

18 U.S.C. § 922(b)(3) 7

D.C. Code § 7-2502.07 8

Sup. Ct. R. 12.5 3

Sup. Ct. R. 12.6 ..... 2, 3

SUMMARY OF ARGUMENT

The city cannot point to any other federal appellate circuit that would apply special standing hurdles in a "non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings." *Seegars* v. *Ashcroft*, 396 F.3d 1248, 1254 (D.C. Cir. 2005).

Nor does the city justify such a doctrine, a task that the court of appeals has repeatedly declined to attempt. Nor can the city seriously question that the D.C. Circuit's standing doctrine is in conflict with decisions of this Court, as well as the practice in other circuits. After all, the D.C. Circuit has explicitly acknowledged these facts. Indeed, since the filing of this cross-petition, the D.C. Circuit reiterated its acknowledgment that its unique standing doctrine is subject to scrutiny by this Court:

> To be sure, as our opinion suggested, the Supreme Court may well disagree with *Seegars*, 396 F.3d 1248 (D.C. Cir. 2005), and conclude that all the plaintiffs have standing.

Parker v. *District of Columbia*, 2007 U.S. App. LEXIS 22872 at *4-5 (D.C. Cir. Sept. 25, 2007) (per curiam). Cross-Petitioners thus address only briefly the city's denial of any conflict on the standing issue.

Unable to rationalize the D.C. Circuit's standing doctrine, or meaningfully contest the fact of its conflict with this Court's precedent and that of other circuits, the city primarily argues that this cross-petition is untimely under the rules of this Court, and

otherwise suggests that Cross-Petitioners are not actually harmed by their supposed lack of standing. Neither argument has any merit. The D.C. Circuit developed a standing doctrine that avowedly departs from this Court's precedents and is at odds with the practice of every other federal circuit. This case presents a timely opportunity to correct that departure.

Finally, Cross-Petitioners submit that the city's newly-professed lack of desire to discuss the standing issue is irrelevant. That issue is before this Court because the city filed multiple motions in the court below seeking to dismiss this case for lack of standing. A party's interest in avoiding review of its legal defense does not diminish the need to conduct such review.

ARGUMENT

I. This Cross-Petition Is Plainly Timely.

The Court's rules are not ambiguous.

> All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court. . . . All parties other than the petitioner are considered respondents.

Sup. Ct. R. 12.6.

> No more than 30 days after a case has been placed on the docket, a respondent seeking to

> file a conditional cross-petition (i.e., a cross-petition that otherwise would be untimely) shall file . . . the cross-petition.

Sup. Ct. R. 12.5.

The petition in No. 07-290 was filed September 4, 2007. This cross-petition was filed six days later, well within Rule 12.5's deadline.

Citing no authority, and perhaps more critically, offering no rationale, the city simply asserts that Rule 12.5 "is best understood to refer to a respondent whose legal interests conceivably could be put at issue in the initial petition." Opp. to Cross-Pet. at 2.

Had this Court intended to limit Rule 12.5 in this fashion, it would have done so by amending the text of Rules 12.5 and 12.6. The fact that Rules 12.5 and 12.6 allow Cross-Petitioners to file their petition suffices to establish their "legal interests" in doing so. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (citations omitted). That maxim applies equally to interpreting court rules.

But even if the text of Rule 12.5 supported the city's restrictive interpretation, which it does not, Cross-Petitioners plainly satisfy those unwritten

restrictions as well. The court of appeals struck down the laws challenged by Cross-Petitioners, ordering the district court to enter judgment in accordance with their prayer for relief. According to the city, "[t]he cross-petition procedure . . . exists in order to permit parties who may be drawn into an appellate proceeding to seek to expand a judgment in their favor." Opp. to Cross-Pet. at 1 (citation omitted). That is exactly what Cross-Petitioners seek to accomplish here.

Indeed, it is precisely that favorable aspect of the judgment – the fact that Cross-Petitioners obtained their desired relief – that the city invokes against the cross-petition's merits, terming the Cross-Petition both untimely and superfluous. Opp. to Cross-Pet. at 6.

It is entirely rational for parties who obtain partial relief to await the filing of a petition for certiorari before filing a conditional cross-petition challenging aspects of the decision below that were adverse to them.[1] Cross-Petitioners are satisfied with the court of appeals' decision granting them relief, but it was not until that relief was jeopardized by the

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[1] That is especially true in this case, considering the city's lengthy delay in filing its petition. Indeed, for some time it was unclear whether the city would file a petition. Cf. *Parker* v. *District of Columbia*, 2007 U.S. App. LEXIS 12467 (May 24, 2007) (Silberman, Senior Judge). Nothing would have prevented the city from changing its mind at the last moment, and there could be no guarantee that the city would have timely filed its petition even had it intended to do so.

petition for certiorari that they were constrained to conditionally contest the adverse aspect of the decision below – i.e., the lower court's aberrant standing doctrine, which, if uniformly applied, would generally deprive Cross-Petitioners and other civil rights litigants of meaningful access to Article III courts.

II. The Decision Below Deprives Cross-Petitioners of Their Right to Access the Courts, a Right Not Dependent Upon Whether It Is Enjoyed by Others in Different Circumstances.

The city does not question, as it cannot, that Respondent Heller had standing to bring the action. It requires no explanation to show that the government's denial of a permit application is an Article III injury. However, the fact of Heller's injury does not diminish Cross-Petitioners' injuries, nor does it make those injuries irrelevant.

The city aptly notes that so long as one plaintiff is found to have standing, courts typically do not scrutinize the standing of the other plaintiffs. Opp. to Cross-Pet. at 6. Indeed, Cross-Petitioners stressed this point at the outset of oral argument below, to no avail.[2] Cross-Petitioners agree that they should not

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[2] Cross-Petitioners cited to the court below its opinion in *Animal Legal Def. Fund* v. *Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) ("We hold that . . . one of the individual plaintiffs, has standing to sue. Accordingly, we need not pass on the standing of the other individual plaintiffs.") *Glickman* held

(Continued on following page)

have been dismissed from the case once the court of appeals accepted Heller's standing, but they are left with the decision on standing as it was written, not as Cross-Petitioners believe it should have been written.

The lower court's standing decision unmistakably bars Cross-Petitioners and all other city residents, including Heller, from accessing the federal courts under the Declaratory Judgment Act. It is simply untrue that Cross-Petitioners "have little if anything to gain from their submission." Opp. to Cross-Pet. at 6. This Court has long recognized the right of District of Columbia residents to have their constitutional rights vindicated by Article III courts. *O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

Indeed, the unique circumstances that gave Heller standing to pursue his claims in this case under the D.C. Circuit's deviant standing doctrine cannot be easily replicated by other District of Columbia residents. The city incorrectly suggests that "the class of persons" who, like Heller, apply to register a handgun, "incurs no substantial burden; the application process is simple." Opp. to Cross-Pet. at 4

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that psychic injury from observing unhappy zoo animals conferred standing to challenge the government's failure to regulate zoos in a manner that would improve the animals' lives. Applying this benchmark, Cross-Petitioners should each have standing to challenge not only the deprivation of their own constitutional rights, but the constitutional deprivations visited upon their fellow humans as well.

(citing Heller's permit application). The suggestion ignores the fact that Heller only had a handgun to register because he once lived in a state where it was legal for him to purchase one. A city resident who is not prescient enough to have bought a handgun while living outside the District could never complete the form submitted by Heller. Under federal law, handguns cannot be purchased at retail across state lines. An individual wishing to buy a handgun can only take delivery of the firearm from a federally licensed dealer in his own state. 18 U.S.C. § 922(b)(3).[3]

At a minimum, the standing doctrine established by the lower court requires that a city resident seeking access to the federal courts in the District of Columbia must first live somewhere else in order to lawfully acquire a firearm that he or she must have in order to complete the city's registration process. This is not only a "significant burden," it is also one that depends entirely on the happenstance of other jurisdictions declining to enact similarly restrictive firearms laws.

In any event, not all Cross-Petitioners had an interest in challenging the handgun ban. The city

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[3] Cross-Petitioners Palmer and Lyon also possess handguns outside the city, but did not seek to register them, reasonably believing that such an attempt would be a futile act. *Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968) (per curiam); *Grid Radio* v. *FCC*, 278 F.3d 1314, 1319 (D.C. Cir. 2002). Following the court of appeals' decision, Palmer sought to register a handgun but the city refused even to give him the application form.

recognizes that Gillian St. Lawrence is interested only in rendering her lawfully-registered shotgun operational, in violation of the city's functional firearms ban, D.C. Code § 7-2502.07. St. Lawrence has no administrative process to invoke, no form to submit and have denied. "At least one other plaintiff (Gillian St. Lawrence) did address Section 7-2507.02 as it applied to shotguns but she did not have the same injury as Heller – the denial of a license." *Parker*, 2007 U.S. App. LEXIS 22872 at *4 (citation omitted).

There is no reason to mandate that city residents in St. Lawrence's position, wishing to challenge a particular law, must depend for their relief on other city residents who wish to challenge other laws, and can do so only by virtue of having once lived elsewhere. Whether a case or controversy exists between two parties depends upon the plaintiff's relationship with the defendant. The question is whether the plaintiff seeking relief has an injury, not whether third-parties with different claims, under different circumstances, are also injured.

Cross-Petitioners are puzzled by the city's insistence that review would be proper "[i]f the D.C. Circuit in a later case applies its pre-enforcement standing jurisprudence to bar all pre-enforcement claims of a certain type." Opp. to Cross-Pet. at 4. As noted at the outset of this brief, the D.C. Circuit has unambiguously barred all "non-First Amendment preenforcement challenge[s] to a criminal statute that ha[ve] not reached the court through agency

proceedings," *Seegars*, 396 F.3d at 1254, absent a showing of an explicit threat that can apparently never be satisfied. It cannot be gainsaid that Cross-Petitioners have been barred from court under a broad, categorical rule.

The risks inherent in outsourcing one's standing also confirm that Cross-Petitioners can be severely harmed if they do not personally have standing. Heller is in excellent health and better spirits, but in the (unlikely) event that he were to pass away or move out of the District of Columbia for reasons unforeseeable, Cross-Petitioners might obtain no relief at all. Surely an individual's right of access to the courts cannot be forcibly assigned to the discretion of a third party.

III. The Decision Below Clearly Conflicts with Decisions of This Court and Various Federal Appellate Courts.

Unaccountably, the city denies that the D.C. Circuit's standing doctrine conflicts with various decisions of this Court and several federal appellate circuits. There is little to add to the repeated and explicit statements of the D.C. Circuit acknowledging precisely that conflict. See Cross-Pet. at 9-12.

Of this Court's plainly contrary decisions in *Medimmune, Inc.* v. *Genentech*, 127 S. Ct. 764 (2007), *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979), and *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), the city states only that

these cases "arose in a different regulatory environment." Opp. to Cross-Pet. at 4. Cross-Petitioners recognize that none of those cases involved challenges to the District of Columbia's gun laws, but precedent is generally more instructive than the precise facts of any specific case.

There is no reason to limit *Medimmune* to patent challenges, *Babbitt* to labor union elections, or *American Booksellers* to the displaying of books. *Babbitt*'s observation that standing depends upon the unique circumstances of each case, Opp. to Cross-Pet. at 4-5, does not deprive the case of precedential value – and does not alter the fact that *Babbitt*'s rule is in conflict with that of the D.C. Circuit, as the court below so readily acknowledged. Pet. App. 6a-7a; *Seegars* v. *Gonzales*, 413 F.3d 1, 2 (D.C. Cir. 2005) (Williams, Senior Circuit Judge).

The city's effort to explain away the conflict between the court below and the Sixth Circuit in *Peoples Rights Organization, Inc.* v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) ("*PRO*") likewise fails. While the city claims that "*PRO* is distinguishable," the D.C. Circuit is of a different opinion:

> Plaintiffs correctly argue that [PRO] supports preenforcement standing in precisely this circumstance. . . . But *PRO* is plainly inconsistent with [*Navegar, Inc.* v. *United States*, 103 F.3d 994 (D.C. Cir. 1997).] Indeed, the imminence of enforcement appears to have been greater in *Navegar* . . . .

Seegars, 396 F.3d at 1255. The D.C. Circuit noted its awareness of the Sixth Circuit's earlier decision in *NRA of America* v. *Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997), see *Seegars*, 396 F.3d at 1255, but it was *PRO* that was found to represent "precisely [the] circumstance" of a pre-enforcement challenge to the District of Columbia's gun prohibitions. *Id.*

The city claims that "there is no indication that any plaintiffs [in *PRO*] had standing on the basis that they 'possessed weapons outside of the jurisdiction,'" Opp. to Cross-Pet. at 5-6 (citing Cross-Pet. at 12) (internal punctuation omitted). The language of *PRO* is otherwise: "The complaint asserts that these individuals continue to own and possess (either within *or outside of the City*) large capacity magazines and firearms" which may be banned. *PRO*, 152 F.3d at 528 (emphasis added). The D.C. Circuit noted that the *PRO* plaintiffs would be deemed injured had they been forced to "store their weapons outside the City, depriving themselves of the use and possession of the weapons." *Seegars*, 396 F.3d at 1255 (quoting *PRO*, 152 F.3d at 529).

In any event, Heller is plainly injured by the fact that he cannot register a handgun, which he keeps by necessity – but certainly not choice – outside the District of Columbia. Yet Heller is not injured any more than are Palmer and Lyon, who also possess handguns outside the District of Columbia; nor is Heller more injured than Parker and Ambeau, who cannot buy handguns; nor is Heller more injured than St. Lawrence, who possesses a non-functional

shotgun within the city but has no futile administrative process to test.

IV. The City's Permission Is Not Required to Petition the Court for Certiorari.

Finally, it does not matter that "the District would have little interest in defending the decision of the court of appeals that cross-petitioners lacked standing even if the cross-petition were granted." Opp. to Cross-Pet. at 7. The government cannot seriously be heard to argue that having prevailed on the standing issue below, certiorari should be denied because it has no interest in discussing the matter further.

The question on certiorari is whether the issue presented is an important one on which guidance from this Court is necessary. Cross-Petitioners, whose right to access the federal courts has been denied at the city's urging, submit that the court of appeals' near-total abrogation of the Declaratory Judgment Act in direct contravention of this Court's precedent satisfies that standard.

As for the claim that granting the Cross-Petition would over-complicate the case, this Court routinely considers questions of standing before resolving substantive constitutional questions. See, e.g., *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2750-51 (2007).

CONCLUSION

If the Court is inclined to grant the petition, it should also grant the cross-petition.

Respectfully submitted,

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